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DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 301

[Docket No. APHIS-2011-0004]

RIN 0579-AD58

Plum Pox Compensation

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Interim rule and request for comments.

SUMMARY: We are amending the plum pox regulations to provide for the payment of compensation to eligible owners of non-fruit-bearing ornamental tree nurseries and to increase the amount of compensation that may be paid to eligible owners of commercial stone fruit orchards and fruit tree nurseries whose tree are required to be destroyed in order to prevent the spread of plum pox. We are also providing updated instructions for the submission of claims for compensation. These changes are necessary to provide adequate compensation to persons who are economically affected by the plum pox quarantine and the associated State and Federal eradication efforts. This action will assist our efforts to eradicate plum pox in the United States.

DATES: This interim rule is effective upon [Insert date of publication in the Federal Register].

We will consider all comments that we receive on or before [Insert date 60 days after date of publication in the Federal Register].

ADDRESSES: You may submit comments by either of the following methods:

- Federal eRulemaking Portal: Go to <http://www.regulations.gov/#!documentDetail;D=APHIS-2011-0004-0001>.
- Postal Mail/Commercial Delivery: Send your comment to Docket No. APHIS-2011-0004, Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road Unit 118, Riverdale, MD 20737-1238.

Supporting documents and any comments we receive on this docket may be viewed at <http://www.regulations.gov/#!docketDetail;D=APHIS-2011-0004> or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690-2817 before coming.

FOR FURTHER INFORMATION CONTACT: Dr. S. Anwar Rizvi, Plum Pox National Program Manager, PPQ, APHIS, 4700 River Road Unit 26, Riverdale, MD 20737-1231; (301) 734-4313.

SUPPLEMENTARY INFORMATION:

Background

Plum pox is an extremely serious viral disease of plants that can affect many Prunus (stone fruit) species, including plum, peach, apricot, almond, nectarine, and sweet and tart cherry. A number of wild and ornamental Prunus species may also be susceptible to this disease. Infection eventually results in severely reduced fruit production, and the fruit that is produced is often misshapen and blemished. In Europe, plum pox has been present for a number of years and is considered to be the most serious disease affecting susceptible Prunus varieties. Plum pox

is transmitted locally by various aphid species, as well as by budding and grafting with infected plant material, and spreads over longer distances through movement of infected budwood, nursery stock, and other plant parts.

There are no known effective methods for treating trees or other plant material infected with plum pox, nor are there any known effective prophylactic treatments to prevent the disease from occurring in trees that are exposed to the disease due to their proximity to infected trees. Without effective treatments, the only option for preventing the spread of the disease is the destruction of infected and exposed trees.

The first documented case of plum pox in the United States was detected in an Adams County, PA, orchard in 1999. In 2006, additional detections were made in New York and Michigan. Through cooperative Federal/State efforts, plum pox has been eradicated in Pennsylvania and Michigan. Currently, portions of Niagara, Orleans, and Wayne Counties, NY, are the only areas in the United States quarantined because of plum pox.

The regulations in Subpart--Plum Pox (7 CFR 301.74 through 301.74-5), referred to below as the regulations, quarantine areas of the United States where plum pox has been detected and restrict the interstate movement of regulated articles (e.g., trees, seedlings, root stock, budwood, branches, twigs, and leaves of susceptible Prunus spp.) from quarantined areas to prevent the spread of plum pox virus (PPV) into uninfected areas of the United States.

In addition to the quarantine and interstate movement restrictions in the regulations, § 301.74-5 also provides for the payment of compensation to eligible owners of commercial stone fruit orchards, including direct marketers, and fruit tree nurseries. Compensation payments are provided to eligible orchard owners to mitigate losses associated with the destruction of trees in order to control plum pox pursuant to an emergency action notification (EAN) issued by the

U.S. Department of Agriculture's (USDA) Animal and Plant Health Inspection Service (APHIS).

Payments are also provided to eligible nursery owners to mitigate the net revenue losses associated with the prohibition on the movement or sale of nursery stock as a result of the issuance of an EAN by APHIS with respect to regulated articles within the nursery in order to control plum pox.

The compensation provisions of § 301.74-5 were established to reduce the economic effect of the plum pox quarantine on affected commercial growers and nursery owners, thus ensuring their continued cooperation with the survey and eradication activities being conducted by APHIS and State plant health agencies. The availability of compensation played an important role in the successful eradication of plum pox from Adams County, PA. Affected owners of commercial stone fruit orchards and fruit tree nurseries in the quarantined areas of New York are eligible for, and have received, compensation payments in connection with the destruction of trees and the resulting loss in income associated with the ongoing eradication efforts in that State.

The compensation provisions for commercial stone fruit orchards and fruit tree nurseries were promulgated in 2000 following the establishment of the plum pox quarantine and regulations. Subsequently, in 2004 we amended the regulations to provide for the payment, under certain circumstances, of compensation to direct market growers, who we defined as growers who produce fruit and sell the fruit themselves for premium prices at farmers markets. The 2004 rule also added provisions for the payment of compensation for stone fruit trees destroyed at less than 1 year of age. Since that 2004 final rule, we have not made any adjustments to the compensation provisions of the regulations.

Increased Payment Amounts

Due to changes in management practices by stone fruit growers and direct marketers and in fruit tree nurseries, along with the effects of inflation and increases in the prices for the products of commercial stone fruit orchards and nurseries containing stone fruit trees, the compensation amounts in § 310.74-5 no longer accurately reflect the economic losses experienced by grove owners, direct marketers, and nursery owners who are subject to an EAN issued by APHIS in order to prevent the spread of plum pox. Further, the State/Federal eradication program has adopted the recommendations of plum pox experts to remove all potentially exposed host trees within a 500-meter radius from an infected tree, so it has become increasingly necessary to update the plum pox compensation rates to reflect current market conditions and thereby ensure the continued cooperation of business operations affected by the eradication program. Therefore, in this interim rule, we are amending § 301.74-5 to raise the payment amounts found in paragraph (b) of that section.

The current amounts of compensation for owners of commercial stone fruit orchards, including direct marketers, are presented in two tables in § 310.74-5(b)(1). Depending on the age of the trees and based on a 3-year fallow period, those amounts range from \$2,403 to a maximum of \$25,859 per acre for direct marketers and \$15,000 per acre for all other orchard owners. The new compensation amounts, which are also dependent on the age of the tree and based on a 3-year fallow period, will range from a minimum of \$3,302 for all growers to a maximum of \$29,743 per acre for direct marketers and \$18,519 per acre for all other orchard owners. We have based the amount of the increased compensation on the recommendations of a panel composed of APHIS and State representatives, industry representatives, and university scientists. The increased amounts are derived from increasing the calculated price per bushel

and taking into account the increased costs of production and of land preparation. The initial regulatory flexibility analysis prepared for this rule, which may be viewed on the Regulations.gov Web site (see ADDRESSES above for instructions for accessing Regulations.gov), provides a detailed explanation of the methodology is used to calculate the updated compensation rates. The methodology used is the same as that used to determine the original compensation rates.

We are also amending the regulations in § 301.74-5(b)(2) to increase the amount of compensation that may be paid to eligible owners of fruit tree nurseries for net revenues lost from their first and second year crops as the result of the issuance of an EAN. We are doing so by increasing the average price per tree, which is one of the factors considered in the formula for arriving at the amount of compensation to be paid.

The average price per tree for a first year crop (trees that were expected to be sold in the year during which the EAN was issued) has been \$4.65 for all tree types, and the average price per tree for a second year crop (trees that would be expected to be sold in the year following the year during which the EAN was issued) has been \$4.65 for plum and apricot trees and \$3.30 for peach and nectarine trees. In this rule, we are setting the average price per tree at \$5.22 for plum and apricot trees and \$3.69 for peach and nectarine trees for both first and second year crops. We based these changes on the adjusted base price for a field-grown 18-inch fruit or nut tree found in the Eligible Plant List (a listing of insurable plants approved by USDA's Risk Management Agency) and Plant Price Schedule (a schedule of prices for insurable nursery plants) for the 2011 and Succeeding Crop Years Nursery Crop Insurance Program.

Eligible Nurseries

As discussed above, owners of fruit tree nurseries may be eligible to receive compensation for net revenue losses associated with the prohibition on the movement or sale of nursery stock as a result of the issuance of an EAN by APHIS with respect to regulated articles within the nursery in order to control plum pox. While the regulations are specific to fruit tree nurseries, studies have proven that non-fruit-bearing ornamental trees are susceptible to plum pox and may serve as host material for the virus. As such, they represent a risk to eradication efforts and are included in the list of regulated articles in § 301.74-2 of the regulations. Currently, three varieties of non-fruit-bearing ornamental trees have been verified as host material for plum pox: Purpleleaf plum varieties, dwarf flowering almond varieties, and sandcherry varieties. Because nurseries containing non-fruit-bearing ornamental trees may be subject to the same prohibitions on the movement or sale of nursery stock as those containing fruit trees, we are amending the regulations to provide that owners of non-fruit-bearing ornamental tree nurseries are eligible for compensation.

Paragraph (a) of § 301.74-5 describes the individuals who are eligible to receive compensation from USDA to mitigate losses or expenses incurred because of the plum pox quarantine and emergency actions. In this rule, we are adding a new paragraph (a)(3) to state that the owner of a non-fruit-bearing ornamental tree nursery will be eligible to receive compensation for net revenue losses associated with the prohibition on the movement or sale of nursery stock as a result of the issuance of an EAN by APHIS with respect to regulated articles within the nursery in order to control plum pox.

Paragraph (b) of § 301.74-5 sets out the amounts that eligible individuals may receive upon approval of their claims. In this rule, we are adding a new paragraph (b)(3) that provides

that the owner of a non-fruit-bearing ornamental tree nursery will be eligible to receive compensation for up to 85 percent of the net revenue losses associated with the prohibition on the movement or sale of nursery stock as a result of the issuance of an EAN with respect to regulated articles within the nursery in order to control plum pox. This is consistent with the existing provisions in § 301.74-5(b)(2) regarding the payment of compensation to eligible owners of fruit tree nurseries. Net revenues will be calculated using an average price of \$10.80 per tree or shrub. This amount is based on the average base prices for two- and five-gallon container-grown deciduous trees and shrubs from the Plant Price Schedule used in the Nursery Crop Insurance Program cited above.

Application Forms

The current regulations provide a mailing address in Pennsylvania from which the form for submitting a claim for compensation may be obtained and to which the completed form must be submitted. Because plum pox has been eradicated in Pennsylvania, our Pennsylvania State office will no longer process compensation claims. Therefore, we are amending the regulations to provide alternative instructions for the submission of claims. Specifically, we are providing a link to the APHIS Web site where individuals seeking to file a claim will find the mailing address, telephone number, and email address for the National Director of the Plum Pox Eradication Program from whom the form for submitting a claim for compensation may be obtained and subsequently submitted. Federal and State officials with the plum pox eradication program will also be able to provide this information in person to affected growers, direct marketers, and nursery owners in the quarantined area.

Immediate Action

Immediate action is necessary to reduce the economic effect of the plum pox quarantine on affected commercial stone fruit growers and nursery owners, thus ensuring the continued cooperation of growers and nursery owners with the survey and eradication activities being conducted by the State of New York and APHIS.

Under these circumstances, the Administrator has determined that prior notice and opportunity for public comment are contrary to the public interest and that there is good cause under 5 U.S.C. 553 for making this action effective less than 30 days after publication in the Federal Register.

We will consider comments we receive during the comment period for this interim rule (see DATES above). After the comment period closes, we will publish another document in the Federal Register. The document will include a discussion of any comments we receive and any amendments we are making to the rule.

Executive Order 12866 and Regulatory Flexibility Act

This interim rule has been determined to be not significant for the purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget.

In accordance with 5 U.S.C. 603, we have performed an initial regulatory flexibility analysis, which is summarized below, regarding the economic effects of this rule on small entities. The full analysis may be viewed on the Regulations.gov Web site (see ADDRESSES above for instructions for accessing Regulations.gov) or obtained from the person listed under FOR FURTHER INFORMATION CONTACT.

The current compensation rates were established in 2000 and 2004 during the initial plum pox outbreak in Pennsylvania. Earnings by stone fruit farmers and nurseries

have since changed due to inflation and changes in management practices. This revision of the plum pox compensation rates will help ensure compliance with the quarantine and provide an incentive for maintaining 500-meter buffers around positive sites, as recommended by USDA plum pox experts and in contrast to the 50-meter buffers that have been used by some growers.

The revised compensation rates are based on the same methodology as was used to determine the current rates. USDA compensates for up to 85 percent of the difference in value between destroyed and replanted orchards. The compensation rate depends on the year in an orchard's life cycle that destruction of the trees occurs. Assuming a 3-year fallow period following the destruction of an orchard, the revised compensation payments range from \$3,302 to \$18,519 per acre, when the farmer sells to processors or wholesalers; and \$3,302 to \$29,743 per acre, when the farmer sells directly to consumers (such as at farmers' markets).

Owners of fruit tree nurseries and non-fruit-bearing tree nurseries who meet the eligibility requirements will be compensated by USDA for up to 85 percent of the net revenues lost from their crops. The lost net revenues for non-fruit-bearing tree nurseries will be calculated using an average price of \$10.80 per tree or shrub. The lost net revenues for fruit tree nurseries will be calculated using an average price per tree at \$5.22 for plum and apricot trees and \$3.69 for peach and nectarine trees for both first and second year crops.

To date, a total of 11 peach growers and 12 nursery owners in the quarantined areas in New York have been compensated for the destruction of PPV-infected and -exposed trees and nursery stock. Most, if not all, of the affected farms and nurseries are considered to be small entities, based on the Small Business Administration standard of annual receipts of not more than

\$750,000 and national sales data. These businesses will directly benefit from the higher compensation rates, and eradication of the disease will be more effectively achieved.

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V.)

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are inconsistent with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

Paperwork Reduction Act

This interim rule contains no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

List of Subjects in 7 CFR Part 301

Agricultural commodities, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Transportation.

Accordingly, we are amending 7 CFR part 301 as follows:

PART 301—DOMESTIC QUARANTINE NOTICES

1. The authority citation for part 301 continues to read as follows:

Authority: 7 U.S.C. 7701-7772 and 7781-7786; 7 CFR 2.22, 2.80, and 371.3.

Section 301.75-15 issued under Sec. 204, Title II, Public Law 106-113, 113 Stat. 1501A-293; sections 301.75-15 and 301.75-16 issued under Sec. 203, Title II, Public Law 106-224, 114 Stat. 400 (7 U.S.C. 1421 note).

2. Section 301.74-5 is amended as follows:

- a. By adding a new paragraph (a)(3) to read as set forth below.
- b. By revising the tables in paragraphs (b)(1)(i) and (b)(1)(ii) to read as set forth below.
- c. In paragraph (b)(2)(i)(B), by removing the figure “\$4.65” and adding the words “\$5.22 for plum and apricot trees and \$3.69 for peach and nectarine trees” in its place.
- d. In paragraph (b)(2)(ii)(B), by removing the words “\$4.65 for plum and apricot trees and \$3.30” and adding the words “\$5.22 for plum and apricot trees and \$3.69” in their place.
- e. By adding a new paragraph (b)(3) to read as set forth below.
- f. By revising paragraph (c) introductory text to read as set forth below.
- g. In the heading of paragraph (c)(3), by adding the words “and owners of non-fruit-bearing ornamental tree nurseries” after the word “nurseries”.

§ 301.74-5 Compensation.

(a) * * *

(3) Owners of non-fruit-bearing ornamental tree nurseries. The owner of a non-fruit-bearing ornamental tree nursery will be eligible to receive compensation for net revenue losses associated with the prohibition on the movement or sale of nursery stock as a result of the issuance of an emergency action notification by APHIS with respect to regulated articles within the nursery in order to control plum pox.

(b) * * *

(1) * * *

(i) * * *

Age of trees (years)	Maximum compensation rate (\$/acre, equal to 85% of loss in value) based on 3-year fallow period	Maximum additional compensation (\$/acre, equal to 85% of loss in value) for 4th fallow year	Maximum additional compensation (\$/acre, equal to 85% of loss in value) for 5th fallow year
Less than 1	\$3,302	\$954	\$842
1	11,639	1,936	1,721
2	16,327	1,936	1,721
3	20,725	1,936	1,721
4	26,222	1,936	1,721
5	28,820	1,936	1,721
6	29,592	1,936	1,721
7	29,743	1,936	1,721
8	29,196	1,936	1,721
9	28,581	1,936	1,721
10	27,889	1,936	1,721
11	27,110	1,936	1,721
12	26,234	1,936	1,721
13	25,248	1,936	1,721
14	24,140	1,936	1,721
15	22,892	1,936	1,721
16	21,489	1,936	1,721
17	20,054	1,936	1,721
18	18,582	1,936	1,721
19	17,070	1,936	1,721
20	15,513	1,936	1,721
21	13,905	1,936	1,721
22	12,382	1,936	1,721
23	10,955	1,936	1,721
24	9,638	1,936	1,721
25	8,442	1,936	1,721

(ii) * * *

Age of trees (years)	Maximum compensation rate (\$/acre, equal to 85% of loss in value) based on 3-year fallow period	Maximum additional compensation (\$/acre, equal to 85% of loss in value) for 4th fallow year	Maximum additional compensation (\$/acre, equal to 85% of loss in value) for 5th fallow year
Less than 1	\$3,302	\$954	\$842
1	6,959	1,072	953
2	10,090	1,072	953
3	12,737	1,072	953

4	16,263	1,072	953
5	17,929	1,072	953
6	18,423	1,072	953
7	18,519	1,072	953
8	18,167	1,072	953
9	17,771	1,072	953
10	17,325	1,072	953
11	16,823	1,072	953
12	16,259	1,072	953
13	15,625	1,072	953
14	14,911	1,072	953
15	14,107	1,072	953
16	13,204	1,072	953
17	12,279	1,072	953
18	11,331	1,072	953
19	10,356	1,072	953
20	9,352	1,072	953
21	8,314	1,072	953
22	7,330	1,072	953
23	6,408	1,072	953
24	5,554	1,072	953
25	4,777	1,072	953

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(3) Owners of non-fruit-bearing ornamental tree nurseries. Owners of non-fruit-bearing ornamental tree nurseries who meet the eligibility requirements of paragraph (a)(3) of this section will be compensated for up to 85 percent of the net revenues lost from their crop as the result of the issuance of an emergency action notification. Net revenues will be calculated using an average price of \$10.80 per tree or shrub.

(c) How to apply. The form necessary to submit a claim for compensation may be obtained from the National Director of the Plum Pox Eradication Program contact listed at http://www.aphis.usda.gov/plant_health/plant_pest_info/plum_pox/index.shtml. Claims for trees or nursery stock destroyed on or before [Insert date of publication in the Federal Register] must be received within 60 days after [Insert date of publication in the Federal Register]. Claims for

trees or nursery stock destroyed after [Insert date of publication in the Federal Register] must be received within 60 days after the destruction of the trees or nursery stock. Claims must be submitted as follows:

* * * * *

Done in Washington, DC, this 30th day of January 2012.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2012-2448 Filed 02/02/2012 at 8:45 am; Publication Date: 02/03/2012]